

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**ROXUL USA, INC.,
a Delaware corporation,**

Plaintiff,

v.

**Civil Action No. 3:19-cv-00054-GMG
(Judge Groh)**

**BOARD OF EDUCATION OF THE
COUNTY OF JEFFERSON,
a West Virginia county board of education,**

Defendant.

**MOTION FOR TEMPORARY RESTRAINING ORDER
OR PRELIMINARY INJUNCTION**

Pursuant to Fed R. Civ. P. 65, Roxul USA, Inc., d/b/a ROCKWOOL moves the Court for a temporary restraining order (“TRO”) or, in the alternative, a preliminary injunction prohibiting the Board of Education of the County of Jefferson (the “BOE”) from taking any action in furtherance of its threat to condemn ROCKWOOL’s real property in violation of State and Federal constitutional guarantees relating to substantive due process, equal protection, and takings. In support of its motion, ROCKWOOL states:

INTRODUCTION

1. The ROCKWOOL group of companies were founded in Denmark in 1937, and they are the world’s leading manufacturers of environmentally-friendly stone wool insulation. [Compl. ¶ 1].¹

2. In late 2016 and in 2017, ROCKWOOL considered 50 sites in 10 states as a location for its new, \$150 million insulation manufacturing facility in the United States. The new facility would, at full operating capacity, create at least 140 new, high-paying jobs. Ranson, West Virginia was one of the sites ROCKWOOL considered. [Compl. ¶ 2].

¹ Under Fed. R. Civ. P. 65(b)(1)(a), ROCKWOOL may incorporate by reference its verified Complaint to support immediate and irreparable harm justifying a TRO.

3. ROCKWOOL was recruited to Ranson by a wide array of state and local officials. In connection with those recruiting efforts, the Jefferson County Commission, the Sheriff of Jefferson County, the Jefferson County Assessor, the Ranson City Council, **and the BOE** offered ROCKWOOL tax incentives if it agreed to build its new facility in Ranson.² [Compl. ¶ 3].

4. ROCKWOOL accepted that offer, closed on property in Ranson, and began site preparation and construction in November 2017. To date, ROCKWOOL has spent more than \$47 million on permitting, constructing, and extending utilities to its new facility. [Compl. ¶ 3-4].

5. Recently, the BOE had a change of heart. Bowing to public pressure created and fueled by half-truths and factual distortions, the BOE now opposes the new facility. For instance, it has very publicly demanded a moratorium on construction, and it has repeatedly threatened to terminate an agreement forming part of ROCKWOOL's property tax incentives. Privately, however, the BOE has acknowledge it has no right to take either action. [Compl. ¶ 7].

6. On April 9, 2019, the BOE tried a different tact—it told ROCKWOOL it had longstanding plans to construct a Regional Student Support Center and offered to buy 194.7 acres of ROCKWOOL's property for a fraction of what ROCKWOOL has spent to develop it. If ROCKWOOL rejected the offer, the BOE threatened to condemn the property.³ [Compl. ¶ 7].

7. Notably, the BOE could have located this Regional Student Support Center *on the approximately 150 contiguous acres of undeveloped property the BOE already owns in Ranson*. Barring that option, upon information and belief, the BOE could have purchased the nearly identically-sized tract next to ROCKWOOL's property from its owners. [Compl. ¶ 8].

8. Instead, the BOE threatened to condemn ROCKWOOL's property where it is building its facility. [Compl. ¶ 9].

² A copy of the Payment in Lieu of Taxation Agreement (the "PILOT") forming part of ROCKWOOL's property tax incentives is attached to ROCKWOOL's Complaint as **Exhibit A**.

³ A copy of the BOE's April 9, 2019 letter to ROCKWOOL is attached to ROCKWOOL's Complaint as **Exhibit B**.

9. The BOE's motive is transparent: by threatening to condemn ROCKWOOL's property, the BOE intends to prohibit ROCKWOOL's lawful activities over which the BOE has *zero* regulatory authority. [Compl. ¶ 10].

10. Under the United States and West Virginia Constitutions, however, "if a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action." *Lingle v. Chevron*, 544 U.S. 528, 543 (2005). Likewise, if a condemnation is commenced for an apparently valid, stated purpose but the real reason for the take is to prevent a land use that the condemning body considers undesirable, it is also prohibited. *See, e.g., Earth Mgmt., Inc. v. Heard County*, 283 S.E.2d 455 (Ga. 1981); *Borough of Essex Fells v. Kessler Inst. for Rehab., Inc.*, 673 A.2d 856 (N.J. Sup. 1995); and *Pheasants Ridge Assocs. v. Town of Burlington*, 508 N.E.2d 1152 (Mass. App. 1987).

11. Here, the BOE's extortionate threat to condemn ROCKWOOL's property if ROCKWOOL does not sell it to the BOE for bottom-dollar is not only improper, it is illegal because it violates these State and Federal constitutional protections and, moreover, is preempted and barred by estoppel.

12. ROCKWOOL therefore is entitled to a TRO or preliminary injunction prohibiting the BOE from taking any action in furtherance of its threat to condemn ROCKWOOL's property.

LEGAL STANDARD

13. The Court's issuance of a TRO or preliminary injunction is governed by Fed. R. Civ. P. 65 and is subject to the same standard.

14. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Proof must be by a "clear showing," *id.* at 22, and "particular regard" must be given to the public interest, *id.* at 24.

ARGUMENT

ROCKWOOL is likely to prevail on the merits of its claims.

15. First, ROCKWOOL is likely to prevail on the merits of its claim that the BOE has violated its substantive due process rights under the 14th Amendment to the United States Constitution and Section 10, Article III of the West Virginia Constitution. For more than 18 months, the BOE has known that ROCKWOOL was investing tens of millions of dollars in permitting, constructing, and extending utility service to its property, and the BOE engaged in numerous discussion with ROCKWOOL about the scope and impact of that work without once indicating ROCKWOOL's property would be targeted for condemnation. BOE's threatened condemnation of ROCKWOOL's property was made only *after* ROCKWOOL refused demands to pause construction of its lawfully-permitted facility. And tellingly, despite its pretextual justification, the BOE has, upon information and belief, held *zero* public hearings, budgeted *zero* funds, and considered *zero* alternative sites that would not require the utility extensions or expensive decommissioning that ROCKWOOL's property would require. The BOE's actions thus represent an official action, policy, or decision, shock the conscience, and violate ROCKWOOL's substantive due process rights under the State and Federal constitutions by arbitrarily, capriciously, and in bad faith targeting ROCKWOOL with the threatened condemnation of its property.

16. Second, ROCKWOOL is likely to prevail on the merits of its claim that the BOE has violated its equal protection rights under the 14th Amendment to the United States Constitution and Section 10, Article III of the West Virginia Constitution. Upon information and belief, the BOE has intentionally treated ROCKWOOL differently than other similarly-situated businesses by, among other things, demanding ROCKWOOL pause construction, demanding a human health risk assessment, negotiating for air monitoring stations, and threatening to condemn ROCKWOOL's property. The BOE's actions thus represent an official action, policy, or decision lacking any legitimate governmental interest, or motivated by animus or ill-will, in violation of equal protection under the State and Federal constitutions.

17. Third, ROCKWOOL is likely to prevail on the merits of its claim that the BOE has violated its property rights secured by the takings clauses under the Fifth and 14th Amendments to the United States Constitution and Section 9, Article III of the West Virginia Constitution. Where, as here, the BOE was part of the group of state and local governmental entities that induced ROCKWOOL to site its facility in Ranson, allowed ROCKWOOL to spend tens of millions of dollars on permitting, construction, and utility extensions, and has, upon information and belief, failed to consider alternative locations, the BOE's threatened condemnation is arbitrary, capricious, and in bad faith under State and Federal constitutional protection relating to takings.

18. Fourth, ROCKWOOL is likely to prevail on the merits of its claim that the BOE's threatened condemnation is preempted by Chapter 22 of the West Virginia Code. The BOE has only those powers delegated to it by the West Virginia Legislature, which has not given the BOE any authority to act in the field of environmental regulation. The BOE therefore cannot threaten condemnation of ROCKWOOL's property to regulate, let alone prohibit, ROCKWOOL's activities that the State has permitted.

19. Fifth, ROCKWOOL is likely to prevail on the merits of its claim that the BOE is estopped from threatening to condemn its property. The BOE promised ROCKWOOL that it agreed to the "acquisition, construction and equipping" of ROCKWOOL's facility. [PILOT § 1.02(c)]. ROCKWOOL reasonably relied on that promise, which was approved in a BOE resolution, to invest more than \$47 million to date on permitting, constructing, and extending utilities to its facility. BOE's threatened condemnation of ROCKWOOL's property after inducing ROCKWOOL to locate in Ranson and then spend \$47 million on its facility to date.

ROCKWOOL will suffer irreparable harm without an injunction.

20. If BOE is not enjoined from the threatened condemnation of its property, ROCKWOOL will be immediately and irreparably harmed through construction delays and impact to its production capacity needs which would ultimately result in lost customers and market share.

ROCKWOOL began its site selection search back in 2016 because of its imperative need for additional capacity by the middle of 2020. Thus, any delay to start up has significant impacts to ROCKWOOL's operations and its ability to fill customer orders. Significantly, these costs and customer and market share impacts would not be compensable in a condemnation proceeding.

The balancing of the equities favors ROCKWOOL.

21. The BOE will not be harmed because it is estopped and preempted from its threatened condemnation of ROCKWOOL's property and it has no legal right to do so for arbitrary, capricious, and bad faith reasons. In addition, ROCKWOOL believes there are alternative sites available to the BOE for development of a Regional Student Support Center, including a 150 acre site the BOE already owns.

22. The balancing of the equities favors ROCKWOOL because of the greater harm it will experience without an injunction and because the BOE acted in bad faith by permitting ROCKWOOL to incur substantial costs associated with the permitting, construction, and extension of utilities to its manufacturing facility.

The public interest favors injunctive relief.

23. The public has a compelling interest in enjoining governmental entities like the BOE from corrupting their condemnation authority to target and retaliate against persons engaging in unpopular activities or holding unpopular views.

ROCKWOOL and its counsel have met the procedural requirements under Rule 65.

24. Counsel for ROCKWOOL has attempted to give the BOE notice of its request for a TRO by e-mailing a copy to Courtney B. Harden of the law firm of BrigliaHundley PC, who advised that she represents the BOE with respect to its threatened condemnation of ROCKWOOL's property. Fed. R. Civ. P. 65(a)(1)(B). Counsel has not been able to confirm actual notice to the BOE at the time of this Motion's filing.

25. ROCKWOOL will provide reasonable security against a TRO or preliminary injunction. Fed. R. Civ. P. 65(c).

WHEREFORE, ROCKWOOL requests that the Court enter an Order:

- (i) temporarily restraining the BOE from taking any action in furtherance of condemning ROCKWOOL's property;
- (ii) in the alternative, preliminarily enjoining the BOE from taking any action in furtherance of condemning ROCKWOOL's property; and
- (iii) granting such other relief as the Court deems just and proper.

* * *

ROXUL USA, INC., d/b/a ROCKWOOL

/s/ James A. Walls

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